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Rodney A. Smolla

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Privacy and Publicity in a Modern Age: A Cross-Media Analysis of the First Amendment

WILL TABLOID JOURNALISM RUIN THE FIRST AMENDMENT FOR THE REST OF US?

*Rodney A. Smolla*¹

I. INTRODUCTION

Imagine that we set out to classify news organizations as falling into one of two Platonic “idealized forms,” the “serious” journalists on the one hand, and the “tabloid” journalists on the other. In the pursuit of this happy exercise we might attempt to list the attributes that we tend to associate with each of these idealized forms.²

II. IN SEARCH OF THE PERFECT TABLOID

The word “tabloid” literally describes a shape, not a journalistic style. The tabloid newspaper is more compact and is folded like a book, unlike the larger “broadsheet.” But I am using the word tabloid here metaphorically, to describe print and broadcast media that engage in “tabloid journalism,” which in its idealized form tends to have the following characteristics:

1. George Allen Professor of Law, University of Richmond, T.C. Williams School of Law.

2. To assist in this exercise, I purchased *The New York Times* and *The Wall Street Journal* for Monday, May 11, 1998, and the May 19, 1998 issues of *The National Inquirer* and *The Star*. Throughout this article references are made to these issues. Copies are on file with the DEPAUL-LCA JOURNAL OF ART AND ENTERTAINMENT LAW.

A. Sensationalism

Material in tabloid journalism is presented in sensational and lurid formats, with glaring headlines and graphic photographs, and content permeated with exaggeration and hyperbole.³

B. Salacious Sinfulness

The subject matter in tabloid journalism typically highlights the salacious elements of human life, with heavy emphasis on sex, infidelity, scandal, drugs, deviance, the bizarre, the macabre, and violence. "News" for the tabloid often equates with "sin."⁴

C. The Seamlessness of Public and Private Life

There is no recognition in tabloid journalism of any dividing line between "public" and "private" life. The private lives of celebrities and leaders, indeed, are a primary focus of attention.⁵

D. Scant Coverage of Political and Social Issues

Significant political and social issues are largely ignored in tabloid publications. If such issues are covered at all, they are covered in a sensational manner.⁶

E. Minimal Sourcing and Attribution

Factual allegations in tabloids are often made with little or no sourcing or attribution. Factual allegations are often false or grossly exaggerated. Gossip, innuendo, and rumor are often

3. See "Kathie Lee Puts Frank on Wonder New Sex Pill," *The Star*, May 19, 1998; "Cher: Sonny Talks to Me Thru Psychic: How I Know Its Really Him," *The National Enquirer*, May 19, 1998.

4. See "Seinfeld: Sizzling Affair with Real Elaine," *The Star*, May 19, 1998, at 6-7.

5. See "Carly Simon: I'm Battling Breast Cancer," *The National Enquirer*, May 19, 1998, at 37.

6. See *The National Enquirer*, May 19, 1998 (copy on file); *The Star*, May 19, 1998 (copy on file).

reported as if they were fact.⁷

F. Sources are Paid for Material

Tabloid journalists often pay sources for material. This includes payments for the telling of stories, or for turning over documentation such as photographs or tape-recordings.⁸

G. Use of Surreptitious Newsgathering Techniques

Tabloids and their reporters often use surreptitious techniques to obtain stories, such as undercover "sting" operations by journalists or the use of hidden cameras and microphones.⁹

H. Paparazzi Photography

Photographs taken by "paparazzi" are used on a regular basis in tabloids.¹⁰ The paparazzi may be employed by the tabloid or may be independent contractors paid for their photographs. Paparazzi tactics include annoying surveillance of subjects, jumping into paths to surprise or annoy subjects being photographed, and the use of undercover techniques to gain access to private places and photograph subjects in private or intimate settings.¹¹

III. THE TRADITIONS OF SERIOUS JOURNALISM

Serious journalism, in its idealized form, tends to have following

7. See "Hollywood's Biggest Lies," *The National Enquirer*, May 19, 1998, at 30-33.

8. See Bill O'Reilly, "We Pay for News. We Have To," *The New York Times*, Feb. 26, 1994 (discussing prevalence of paying for stories among print and broadcast tabloid journalists).

9. *Id.*

10. See Rodney Smolla, *From Paparazzi to Hidden Cameras: The Aggressive Side of a Free and Responsible Press*, 3 COMM. L. POL'Y 315 (1998).

11. See *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973) (describing typical paparazzi tactics).

characteristics:

A. Thoughtful Presentation

In serious journalism, material is normally presented in a professional and thoughtful manner, in tones that are muted and sober. In the most serious of serious journalistic enterprises, hyperbole and sensationalism are eschewed.

B. Emphasis on Political, Social, Scientific, Artistic, and Financial Issues

Serious journalism tends to take as its subject matter the political, social, scientific, artistic, religious and financial issues of the day. Political and governmental topics tend to dominate coverage. The “sinful” aspects of life, such as sex and infidelity, are normally not the focus of coverage.¹²

C. The Dividing Line Between Public and Private Life

In serious journalism, there is a presumptive dividing line between public and private life. The private lives of public figures are normally deemed irrelevant and not newsworthy, absent some clear and palpable nexus to the public figure’s fitness for or performance in his or her public role.¹³

D. Sourcing and Documentation

In serious journalism, material is well-sourced and well-documented. Facts are typically confirmed by more than one source. Confidential sources play a central role in traditional

12. The headlines on the top of the front page of *The New York Times* Monday, May 11 edition were: “Dominican Drug Traffickers Tighten Grip on the Northeast,” “Agency Grounds Scores of 737’s to Check Wiring,” “U.S. Give Reprieve to Israeli Leader on Pullout Plan.” The front page of *The Wall Street Journal* for the same day concentrated on business and financial stories. The front-page news summary included stories on the FAA’s grounding of Boeing 737 aircraft, a Mideast summit, Sinn Fein’s endorsement of the Northern Ireland peace accords, and rioting in Indonesia.

13. See Rodney A. Smolla, *Free Speech in an Open Society*, 117-50 (1992).

serious journalism,¹⁴ but attempts are usually made to disclose to the reader the institutional affiliation or professional placement of the confidential source.

E. Gossip, Rumor, and Innuendo are Not Presented as News

In serious journalism, facts are not exaggerated or presented in a sensational manner. Gossip, rumor, and innuendo are not presented as news.

F. Sources are Not Paid for Material

In serious journalism, sources are never paid for material. The internal operating standards of serious news organizations generally forbid paying sources for stories or information as a matter of corporate policy.¹⁵

G. A Presumption Exists Against Surreptitious Newsgathering Techniques

In serious journalism, surreptitious newsgathering techniques are disfavored. Some serious news organizations prohibit any surreptitious newsgathering techniques. Journalists must identify themselves whenever they talk to witnesses or sources, including the "target" of a news investigation. Journalists must explain the nature of the story they are pursuing, so as not to ambush, trick, or mislead the source or target. Hidden tape-recorders or cameras are not used, and sources and witnesses are never taped or photographed without their prior knowledge and consent. Other serious news organizations do permit some surreptitious newsgathering techniques, but only as a "last resort" in the pursuit of a story, and only when the story is particularly important and merits deviation from the presumption disfavoring such techniques.¹⁶

14. See *Branzburg v. Hayes*, 408 U.S. 665 (1972).

15. See Dan Rather, "When News and Entertainment Look Alike," *The New York Times*, March 8, 1994 at A20.

16. See *Food Lion, Inc., v. Capital Cities/ABC, Inc.* 887 F.Supp. 811 (M.D. N.C. 1995), discussed *infra* at text accompanying notes 56-57.

H. Paparazzi Are Not Used

Serious journalists do not themselves engage in paparazzi tactics to photograph, film, or interview subjects of stories, and serious news organizations do not purchase or use material produced by paparazzi.

IV. THE CONVERGENCE OF TABLOID AND SERIOUS JOURNALISM

A. The Forms Merge

Political philosophers debate whether the “state of nature” and the ensuing “social compacts” envisioned by natural law/social contract theorists such as Thomas Hobbes and John Locke are meant to be understood as actual historical epochs and events, or as theoretical constructs posited by social contract thinkers to explain and justify the existence and legitimacy of things like government and legal rights. In much the same manner, we might debate whether the “idealized” tabloid or the “idealized” serious news organization ever existed in actual historic fact. I do not assert that either form ever existed in pristine purity, but merely that there was a time in our cultural imagination in which it seemed possible, for the most part, to tell the difference between the two. It is particularly important to emphasize that I do not make the extravagant claim that there was a bygone golden era in which all journalists were serious and responsible. Yellow journalism has long been part of the American scene, real and imagined, from William Randolph Hearst to *Citizen Kane*. I make only the more modest assertion that in the not-all-that-distant past most in the culture *believed* that *most* mainstream journalistic outlets were *not* tabloid but serious, and were more or less purely so. On the tabloid side were supermarket checkout publications like *The National Enquirer* and *The Globe* and *The Star*, and lurid big-city tabloids like *The New York Post*. On the serious side were such frumpy mainstays as *The Wall Street Journal*, *The New York Times*, Walter Cronkite, PBS, NPR, and CNN.

Over the last decade, however, the idealized forms have merged in the public mind. Occasionally tabloids scoop “serious” stories,

or are distinguished by highly probative and reliable reporting. *The National Enquirer*, for example, is widely credited for its high-quality coverage of the O.J. Simpson trial.

The convergence, however, comes more from the "serious side," as traditional mainstream news organizations, print and broadcast, present material and engage in practices that seem to crossover into the tabloid world. At one time or another in the last decade, most major "serious" news organizations have engaged in virtually every type of practice that we once associated primarily with tabloids.

B. Accounting for the Convergence

What are the cultural forces that have caused this movement? Why are serious news organizations increasingly "tabloidy?" The answer here can never be much more than hypothesis. I have three principal nominees that I suspect contribute in large part to this movement:

1. Competitive Pressures

The pressure to maintain or boost circulation and broadcast ratings in a marketplace with ever increasing competitive pressures may tend to make serious journalists more tabloid-like.

First, competitive pressures take their toll on accuracy. Speed will cause error. There is tremendous pressure to be the first to break a story, or to break new developments in an old story. This creates the temptation to present material as factual before the journalist has had the opportunity to cross-check and confirm the information. In this atmosphere gossip and rumor are more apt to find their way on the air. Similarly, it is increasingly common for one news organization to present as "fact" material presented by another news organization, before the second news outlet has had the chance to verify independently the information in the story. Thus, ABC News might report that Monica Lewinsky has a dress in her possession with semen stains from President Clinton. CNN may then report the "fact" that ABC news is reporting the "fact" of the existence of the semen-stained dress, even though CNN has not been able itself, independently, to confirm the story. Soon the story is reverberating through the media and the culture, taking on the rarefied dignity of authenticated reality. Meanwhile, long after

the dress has entered the archives of national myth, the factual basis for the original story may become clouded in ambiguity.

Secondly, competitive pressures may lead to stories that are racier, sexier, more sensational, more salacious. Sex sells. Since sex sells, there is a temptation to put more sex in the news, on the simple theory that the spicier the news, the more people will buy it. This may not be good marketing for everyone. If *The Wall Street Journal* became a scandal sheet it would presumably lose readership. But other news organizations, particularly the news departments of broadcast networks, may make a different calculation.

2. *Changing Cultural Norms*

There may be more sex and scandal in mainstream “serious” reporting today because mainstream serious readers, listeners, and viewers believe sex and scandal are serious business. The truth is that there is no simple answer to the question of whether the President’s sex life is or is not a matter that ought to be of interest to the intelligent and well-informed citizen. The arguments on each side are well-known. One of the stock and popular views is that what the President does in his private life is his business. It’s between Bill and Hillary, or Bill and his conscience, or his God, or his lovers. But whoever it is between it is not between Bill and the voters, who should judge him on affairs of state and not affairs of the heart.

The opposite argument is that voters have a need and right to know about a leader’s character. If the President has been unfaithful in his personal life this speaks to a flaw that may spillover into public life. We expect Presidents to be moral examples, and to lead through moral authority. If the President is a moral scoundrel this speaks directly to his capacity for leadership.

If these extreme arguments at the poles are well-known, so are most of the way-stations in between. Many voters, for example, believe that the President’s infidelities are presumptively his private business. If crime, however, is involved, the infidelities become public business. Virtually everyone agrees that if the President has engaged in sexual harassment, obstruction of justice, or subornation of perjury, he has no plausible claim to privacy for

it. Others argue that the presumption of privacy may be overcome if a particular liaison has "spillover" consequences for his job--by, for example, leading to a breach of national security.

Finally, there is the complex cultural ambivalence about discussion of amorous relationships generally, and whether discussion about them is or is not a worthy topic of "serious" public discourse. The romantic and sexual relations of men and women, women and women, or men and men are central to human life, and central to human discussion. Love, romance, sex, and fidelity have always been central themes of art, literature, drama, music, religion, science, and entertainment. And discussion of laws and the propriety of various kinds of social behavior concerning these topics are properly part of our political discourse.

If all this is true, then the "tabloidizing" of mainstream news may be healthy, not pathological. Under this view, the news is simply coming out of the closet. Sex is finally on the front page, where it belongs.

An important thing to emphasize here is that it does not matter whether one approves or disproves of these changing cultural norms, or even whether one even believes that the norms are in some profound way changing. All one need accept is that the norms are now somewhat "in play," that there is uncertainty about the new ground rules, and that in the face of that uncertainty some journalists will decide to present material on the seamier sides of life that they might in an older epoch not have presented, because those journalists genuinely believe that at least some portion of their audience demands and expects that such material be discussed.

Indeed, following this theme through, to the extent that the underlying values and expectations of the culture are changing, when mainstream news organizations present sex and sin they arguably are not "going tabloid" at all. For those consumers of news who believe that the sexual activity of the President is serious business, one would expect that they would want and demand that serious journalists cover this serious business in a serious way.

3. The Proliferation of Media

The sheer proliferation of media, particularly the Internet

phenomenon, may drive the content of news in ways that push it toward the more tabloidy end of the spectrum. I am talking here of something different from mere economic or professional competitiveness, as such. The pressures of competition--pressures that are likely to be intensified by the proliferation of media--have already been discussed. But over and above competitive pressures, the mere *existence* of hundreds of major voices and hundreds of thousands of lesser voices on the Internet may have a tendency to make mainstream news more tabloid. Rumor, gossip, and various other forms of pseudo-fact now reverberate across electronic space, taking on a life virtually unchecked by the restraints of law, social convention, accountability, or professionalism. The Internet has unloosed the far-flung potential of the human imagination, good and evil. The Internet is a seemingly infinite resource of information, insight, and connection. It is also awash in misinformation and outright lies. There is little to counter the false fact on line. The sender may be protected by anonymity--itself a First Amendment right¹⁷--and thus be largely unaccountable to the laws of libel or invasion of privacy, let alone to such social restraints as journalistic ethics and reputation or good manners.

The extremes of the Internet infiltrate mainstream discourse. A rumor that has bounced around cyberspace for a month but never broken through to the front pages of *The Washington Post* will have a greater tendency to be credited by a *Post* reporter and mentioned in a story once there is the smallest confirmation or "news hook" upon which to hang it than in an older era, prior to the Internet, when rumor was far less widely broadcast. It is a matter of collective de-sensitizing, a process of mass conditioning, in which the rapidity with which messages are sent and received and their exponential capacity to be fruitful and multiply conspire to bestow on "facts" that may be spun from nothing a palpable verisimilitude that enables them to fake their way into mainstream discourse.

17. See *McIntyre v. Ohio Elections Commission*, 115 S. Ct. 1511 (1995) (striking down ban on anonymous political literature).

V. THE FIRST AMENDMENT CONSEQUENCES

What are the First Amendment consequences of this convergence? I wish to explore three types of consequences, relating to subject matter issues, standards of care, and the newsgathering process.

A. Subject Matter Consequences

An ongoing debate in modern First Amendment discussion concerns the question of whether the constitutional protection enjoyed by speech does or should increase with the “importance” or “seriousness” of the topic.

One view is that the First Amendment should not be calibrated to judgments about the importance of the subject matter, because the very decision over what is or is not important is itself a matter of debate that is no business of the government, including its courts. Under this view the principles that should animate First Amendment doctrine are deemed inconsistent with any “hierarchy” of speech topics. The construction of such a hierarchy is itself seen as antithetical to free speech values. Thus political speech is not more “favored” than artistic or entertaining speech.¹⁸ Speech that promotes lawful resolution of disputes, the building of a sense of community, or values of tolerance is not more favored than speech that preaches violent revolution, ethnic conflict, or hatred.¹⁹ Speech concerning sex, sin, and scandal, under this perspective, deserves the same level of protection as speech concerning the more decorous aspects of human life.²⁰

Adherents of this position will tend to eschew linking protection of freedom of speech to any narrow philosophical justification. They will reject the notion that the principal purpose of the First Amendment is to facilitate discussion of politics and democratic

18. See Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech*, §2:36, §2:46 at 2-36-44 (3d Ed. 1994).

19. *Id.*

20. *Id.*

self-governance. They will instead embrace far more spacious conceptions of the First Amendment's purpose. This may include an expansive conception of the need to permit free discussion in the marketplace of ideas on topics as broad as human thought and feeling.²¹ Alternatively, freedom of speech may be seen primarily as serving the interest of promoting self-realization of the speaker.²² Finally, some may eschew any attempt to tie freedom of speech down to one philosophical justification, instead choosing a collective and eclectic approach that includes the widest possible range of justifications.²³

For those who eschew hierarchy, First Amendment doctrines such as the presumption against the validity of content-based distinctions,²⁴ and the even stronger presumption against the validity of viewpoint-based distinctions,²⁵ are seen as vital to First Amendment architecture. These doctrines are the bulwark of neutrality. Any attempt to prioritize speech according to subject matter is perceived as an affront to the doctrinal hostility toward content and viewpoint discrimination.

The opposite view is, predictably, the opposite view. Speech is prioritized, for constitutional purposes, from speech of highest value to speech of lowest value, and constitutional doctrines increase or decrease in their protective intensity, like different

21. See *Branzburg v. Hayes*, 408 U.S. 665, 726-77 (1972) (Stewart, J., dissenting) (asserting that the First Amendment's protection of the press enhances "personal and self-fulfillment by providing the people with the widest possible range of fact and opinion." *Id.* at 726.).

22. See Thomas I. Emerson, *The System of Freedom of Expression* 6 (1970).

23. See Laurence Tribe, *American Constitutional Law*, § 12-1, at 789 (2d ed. 1988).

24. See *Simon & Schuster, Inc., v. New York State Crime Victims Bd.*, 502 U.S. 105 (1991) (applying strict scrutiny test to strike down New York's "Son of Sam" law because of content-based discrimination).

25. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down hate speech law on grounds that it was both content-based and viewpoint-based).

levels of First Amendment sun-block, according to the significance of the subject matter.²⁶ Speech on political affairs is usually ranked highest.²⁷ Speech on sex is ranked at the bottom. The more explicit and vulgar, the lower it goes.²⁸ Other topics are arrayed in between, depending on who is doing the ranking. Commercial speech is often placed quite low, perhaps just a cut above sex. The values of elite culture often seem to inform the rankings. What's good enough for PBS is good enough for the First Amendment.

Adherents of the hierarchical view may cogently argue that current First Amendment doctrine tracks this notion of high-end and low-end speech, and that a description of current doctrine in hierarchical terms is more accurate than a description grounded in such sweeping abstractions as "content-discrimination" or "viewpoint-discrimination." There is something to this case. The Supreme Court has remarked with some frequency that political speech is at the "core" of the First Amendment.²⁹ At the opposite end of the spectrum, obscenity is given no First Amendment protection at all, because it is deemed to contribute nothing of significance to the marketplace of ideas.³⁰ Various other categories of expression, such as commercial speech, are given intermediate

26. See Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948).

27. See Robert Bork, *Neutral Principles and some First Amendment Problems*, 47 IND. L.J. 1 (1971).

28. This is, arguably, what modern obscenity law reduces to. See *Miller v. California*, 413 U.S. 15 (1973).

29. See *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("The First Amendment affords the broadest protection to such political expression . . ."); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (First Amendment exists "[T]o permit the continued building of our politics . . ."); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (freedom of speech "the essence of self-government"); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.").

30. See *Miller v. California*, 413 U.S. 15 (1973).

levels of protection.³¹

My own view is that while First Amendment doctrine has yet to fully clarify itself regarding these two approaches, the general push of the last three decades has been away from the hierarchical approach. Thus speech that one might have assumed would fall into a low-grade category has at time received very high levels of protection, such as the hate speech at issue in *R.A.V. v. City of St. Paul*,³² a case that stands out for the general doctrines against content and viewpoint discrimination trumping the government's attempt to regulate ostensibly low value speech.

One interesting conundrum in all of this is the tension between "hierarchical" approaches to the First Amendment and "categorical" approaches. At first the two might seem to be essentially the same thing. The hierarchical approach pigeonholes speech into categories, and then ranks them by importance.³³ But one might reject hierarchies, and nonetheless seek comfort in categories. Some stout defenders of freedom of speech may find appeal in this approach. They may believe that entertaining speech is as protected as informing--and thus they are not, strictly, hierarchical thinkers. Yet at the same time they may choose to explain the soft spots in First Amendment protection of speech as examples of a small set of tightly defined categories of expression that receive little or no protection. The constant First Amendment battle, under this approach, is to ensure that the categories do not proliferate or expand.

How does the tabloidization of modern mainstream media dovetail with these First Amendment debates? Perhaps the most significant connection involves one of the still largely undeveloped doctrinal questions in contemporary First Amendment jurisprudence, the meaning of the term of art "matters of public concern." In two areas of First Amendment law, the principles

31. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

32. 505 U.S. 377 (1992).

33. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

governing the speech of public employees,³⁴ and libel law,³⁵ the Supreme Court has held that the speech at issue must be on matters of public concern in order for high levels of First Amendment protection to apply. The Supreme Court, however, has done very little to supply meaning to the phrase "matters of public concern." It is unclear whether the phrase is intended to impose the full-blown hierarchical approach on First Amendment law, or is instead a more modest filtering device that simply screens out and disqualifies speech on mundane matters within a government employment setting, or on libelous statements of interest to no one other than a small number of persons concerned with a particular transaction or enterprise--such as the credit-worthiness of a business.³⁶

The relevance of these First Amendment subject matter doctrines to tabloid journalism is obvious. If the First Amendment is understood as a hierarchy, in which important speech gets greater protection than unimportant speech, what will courts do when confronted with libel or privacy cases involving sex and scandal? Even if the full hierarchical approach to free speech is not adopted, might tabloid topics be treated as "not of public concern," and thus outside the First Amendment's protective ambit? Alternatively, the greater attention paid to sex and scandal by mainstream media

34. See *Connick v. Myers*, 461 U.S. 138, 146 (1983) (When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.).

35. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (plurality opinion) (holding that heightened First Amendment standards for libel applicable to rules governing presumed and punitive damages do not apply when the speech at issue is not on a matter of public concern).

36. The plurality opinion in *Dun & Bradstreet, Inc.* characterized the speech at issue--a credit report--as "solely in the individual interest of the speaker and its specific business audience," and further noted that the report "was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further." *Id.* at 762.

might actually work in favor of granting full levels of constitutional protection to such speech, on the simple grounds that such topics must be on matters of public concern or there would be no way to explain all the concern that is paid to them.

I believe that the cultural momentum is against tabloid journalism, whether practiced by traditional tabloids or by the serious press. Whether the criticism is fair or not, many members of the public believe that the press has focused too much attention on the President's sex life, vacillating between indifference and disgust over the whole business. These attitudes are not universal, but I believe they now predominate in the national mood, and that mood will subtly influence outcomes in libel and privacy trials in a manner hostile to the media. Judges and juries alike will be inclined to treat stories on the salacious side of life as not being on matters of public concern. This development could happen through the hedging of formal doctrine. But I believe it is more likely to happen covertly, through more frequent findings of liability and higher damages awards.³⁷

B. Standard of Care Consequences

To the extent that the First Amendment speaks to the standard of care that journalists must observe in presenting material, it has tended to focus on the intent, recklessness, or negligence of journalists with regard to the truth or falsity of a story.³⁸ Although

37. See *MMAR Group Inc. v. Dow Jones & Co.*, 987 F. Supp. 535 (S.D. Tex. 1997). The *MMAR Group, Inc.* case, brought against the publishers of *The Wall Street Journal* and one of its reporters, produced the largest libel jury award in history, \$222.7 million, with \$22.7 million in compensatory and \$200 million in punitive damages. The trial court vacated the punitive damages award and as of this writing the entire award is on appeal.

38. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (establishing "actual malice" standard--requiring knowledge of falsity or reckless disregard for truth or falsity--in libel suits involving public officials and matters of public concern). See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (establishing negligence as minimum constitutional fault standard in libel cases involving private figures and matters of public concern.).

the First Amendment has been applied to an array of tort,³⁹ contract,⁴⁰ and criminal law sanctions against journalists,⁴¹ far and away the most well-developed area of law here is in the libel field.⁴² As journalists become increasingly "tabloidy," what impact is this likely to have in the evolution of standard-of-care norms? How will the well-grooved doctrines that have evolved in libel law be applied to other torts, particularly privacy invasions? Even if formal doctrines, such as the "actual malice" standard applicable in public figure and public official libel suits, do not change, is it likely that juries and judges will apply those doctrines in a manner increasingly hostile to the media? Or will the aggressive news gathering and increasingly sensational presentation of material

39. *See, e.g., Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (declining to impose First Amendment restrictions barring cause of action for invasion of right of publicity).

40. *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (refusing to treat First Amendment as barring a promissory estoppel claim arising from a newspaper's breach of promise of confidentiality to a source).

41. *See United States v. Barnett*, 667 F.2d 835 (9th Cir. Cal. 1982) (permitting criminal prosecution for aiding and abetting illegal drug distribution against publisher of manual instructing persons on how to manufacture illegal drugs); *United States v. Buttorff*, 572 F.2d 619 (8th Cir. 1978), *cert. denied*, 466 U.S. 980 (1984) (sustaining criminal prosecution against tax protestors for aiding and abetting tax evasion for distributing literature and making speeches providing instruction on illegal tax evasion). *See also Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 66 U.S.L.W. 3683 (U.S. April 20, 1998) (sustaining civil cause of action brought by families of victims of murders against publisher of a manual containing detailed instruction on how to commit murder for hire when that manual was used by a professional hit man to carry out the murders, and in which the publisher stipulated, for purposes of a motion for summary judgment, that it knew and intended that the manual would be used, upon receipt, by criminals to plan and execute the crime of murder for hire).

42. The Supreme Court, for example, has elaborated on the meaning of the "actual malice" standard in libel cases a number of times. *See, e.g., Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991); *See also Harte-Hanks Communications, Inc., v. Connaughton*, 491 U.S. 657 (1989); *St. Amant v. Thompson*, 390 U.S. 727 (1968).

characteristic of modern times tend to “inoculate” the press, by conditioning us to treat such behavior as typical, normal, and simply part of modern life?

Again, my prognostication is that the press will take hits on this score, as judges become more willing to treat standard of care issues as within the purview of juries, and juries become increasingly willing to find that journalists have fallen below acceptable standards, and increasingly willing to return high verdicts as a result. Journalists will be especially vulnerable for printing highly explosive charges without thorough advance investigation and confirmation. It is settled doctrine that the mere failure of a journalist to further investigate a story is not enough, standing alone, to sustain a finding of actual malice.⁴³ On the other hand, it is also settled that actual malice can be established through publication of a “pre-conceived” story, or through “wilful blindness” to obvious leads that might contradict a story line.⁴⁴ It will be the intermediate cases, falling somewhere in between these two situations, that will be in play before juries. Judges may be expected to dutifully scold juries with instructions that they must find more than mere “negligence” in public figure libel cases, that they must find that the journalist published a story in the face of “subjective doubt” as to its truth or falsity. But judges will also be increasingly willing to let close cases on subjective doubt proceed to the jury, reasoning that objective evidence of a journalist’s failure to follow-up an obvious lead may at least be probative of subjective doubt, notwithstanding the journalist’s courtroom protestations of innocence.

In *Eastwood v. National Enquirer, Inc.*,⁴⁵ for example, Judge Alex Kozinski, writing for the United States Court of Appeals for

43 . See *St. Amant v. Thompson*, 390 U.S. 727 (1968); Rodney Smolla, *Law of Defamation*, § 3.17 at 3-42-43 (1986 & 1997 Supp.).

44. See *Harte-Hanks Communications, Inc., v. Connaughton*, 491 U.S. 657 (1989); Rodney Smolla, *Law of Defamation*, § 3.18 at 3-42-47 (1986 & 1997 Supp.).

45. 123 F.3d 1249 (9th Cir. 1997) (Kozinski, J.).

the Ninth Circuit, in an opinion displaying the impish play of intelligence for which he is well distinguished, held that Hollywood star Clint Eastwood had satisfied the actual malice standard in a suit against the *National Enquirer*. The case arose from an "exclusive interview" printed by the *Enquirer* that Eastwood claimed never took place. The *Enquirer* actually lifted the interview from a London tabloid, presenting it as its own. Eastwood denied ever giving an interview to either publication. "As we have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published, we must be guided by circumstantial evidence,"⁴⁶ the court wrote. "By examining the editors' actions we try to understand their motives."⁴⁷ The court conceded that there is no actual malice where journalists *unknowingly* mislead the public.⁴⁸ But on the record before it, the Court held a reasonable jury could conclude that the editors knew or should have known that their statements would be misleading.⁴⁹ There was testimony that the *Enquirer* used a kind of code, applying the label "*Enquirer* Interview" where an interview is given to the *Enquirer* directly, and "*Exclusive* Interview" where it was not.⁵⁰ But if this "code" was well-understood among insiders in the tabloid business, the Court doubted that it was of much assistance to the average reader or checkout counter browser.⁵¹ The record, the Court held, supported the conclusion that the *Enquirer* set out to create the impression that it had directly interviewed Eastwood, and that was

46. *Id.* at 1253.

47. *Id.*

48. *Id.* at 1256 (*citing* Bose Corp. v. Consumers Union, 466 U.S. 485, 513 (1984)).

49. *Id.*

50. *Id.*

51. *Id.*

sufficient to support a finding of actual malice.⁵²

C. Newsgathering Concerns.

Challenges to aggressive newsgathering techniques are only just beginning to filter their way through litigation. They pose a number of intriguing issues:

1. Sealed or Classified or Material Intentionally or Inadvertently Leaked

The publication of material that is classified or judicially sealed is a commonplace in modern journalism. This is not a practice properly classified as tabloid in style, for it has venerable roots in mainstream media publications, most famously, in the publication of the Pentagon Papers by *The New York Times* and *The Washington Post*.⁵³ First Amendment doctrine forbidding prior restraints enjoining the publication of such material when it falls into the hands of journalists remains strong. In *Procter and Gamble Co. v. Bankers Trust Co.*,⁵⁴ for example, the United States Court of Appeals for the Sixth Circuit struck down as an unconstitutional prior restraint an order preventing *Business Week* magazine from publishing materials sealed pursuant to a protective order obtained by the magazine through the disclosure by a member of a law firm representing one of the parties who did not realize the materials were sealed.

Less clear, however, is the question of whether journalists may be punished *after the fact* for such publication, such as through fines for contempt of court. An important test of this question is currently pending before the United States Court of Appeals for the Fourth Circuit.

The case involves Kirsten Mitchell, Raleigh Bureau Chief for the

52. *Id.*

53. *See New York Times Co. v. United States*, 403 U.S. 713 (1971) (holding unconstitutional prior restraints against publication of “The Pentagon Papers”).

54. 78 F.3d 219 (6th Cir. 1996).

Wilmington Morning Star. Mitchell inspected a settlement agreement handed to her by a federal district court clerk. The agreement confirmed information previously obtained by the *Morning Star* from independent sources, verifying that the Conoco oil company had settled an environmental tort suit brought by 178 trailer park residents for the sum of \$36 million. The settlement agreement was contained in an envelope that was part of a stack of court records handed to Mitchell by the court clerk, in response to a request by Mitchell to the clerk asking for the court records filed subsequent to the settlement of the suit. In the process of handing Mitchell the material, the clerk extracted some documents, explaining that Mitchell could not have access to them because they were sealed. Among the materials handed to Mitchell was the envelope containing the settlement agreement. The front of the envelope contained a legend indicating that it was filed under seal and was to be opened only by the court. Mitchell testified, however, that since on her pile of materials the back of the envelope was face-up, she did not see this warning until after she read the settlement agreement. The envelope had previously been opened, and red printing on the envelope flap, visible on the back side which she did see, said "Opened." The initial order sealing the settlement agreement was entered without the hearing processes and substantive judicial findings required to seal a court document. Neither Kirsten Mitchell nor the *Morning Star* were parties in the underlying litigation, or bound by the terms of the sealing order.

The *Morning Star* published a newspaper story containing details of the settlement agreement, including the settlement amount. In that story the newspaper attributed its information concerning the settlement amount to unnamed confidential sources, and also stated that the amount had been confirmed through examination of official court documents given to a reporter by a court official.

Applying Media Guidelines promulgated by the Department of Justice in 1980 to protect freedom of the press,⁵⁵ the Attorney

55. 28 C.F.R. § 50.10 (1980).

General of the United States declined to pursue contempt prosecutions against the *Morning Star* and its reporters. Notwithstanding the Attorney General's refusal to prosecute--and indeed, before the Attorney General had even completed analysis of the matter--the District Court appointed its own special prosecutor. The District Court fined Mitchell \$1,000 for criminal contempt, and held Mitchell and the *Morning Star* jointly liable for \$500,000, plus costs and attorneys' fees, for civil contempt.⁵⁶

The contempt fines should be deemed unconstitutional and should be reversed on appeal. Whether the leak of a sealed litigation document comes from lawyers, parties, or court personnel, and whether it is the product of deliberate disobedience or mere negligent oversight, the press has a First Amendment right to examine the information, make an independent judgment as to whether it is newsworthy, and disseminate it to the public.⁵⁷ Under the First Amendment, a leak is a leak, and a government document is a government document, whether coming from the executive,

56. At the time of this writing, briefs were being filed in the appeal of the fines to the Fourth Circuit. See *Ashcraft v. Conoco, Inc.*, *Wilmington Star-News, Inc.*, and *Kirsten Mitchell*; *United States v. Mitchell*, Nos. 98-1212, 98-1213, 98-1448, 98-1449, 98-4158 (4th Cir. 1998). Rodney A. Smolla, the author, was Counsel of Record for Amici in support of Kirsten Mitchell and the newspaper. Amici included the *News and Observer* of Raleigh, North Carolina, owned by The McClatchy Company, *The Charlotte Observer*, a Knight Ridder paper, *The Baltimore Sun*, owned by Times-Mirror, *The Richmond Times-Dispatch*, owned by Media General, The McGraw-Hill Companies, Inc., *The Washington Post*, The Gannett Company, Dow Jones & Company, publishers of *The Wall Street Journal*, the North Carolina Press Association, The Associated Press, and The Reporters Committee for Freedom of the Press.

57. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 496 ("If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish. Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast.")

legislative, or judicial branch.⁵⁸ The press and the government are not engaged in a joint venture, and the press is not a public utility. In our society the press is structurally independent, dealing with the government at arms length:

A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment. It has yet to be demonstrate how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.⁵⁹

These principles have been consistently applied by the Supreme Court to override interests far more compelling than the mere corporate conceit at issue in Conoco's settlement of a toxic tort case. Thus the Court has refused to permit civil liability against the media for the revelation of the identity of rape victims lawfully

58. See Lawrence H. Tribe, *American Constitutional Law*, §12-21 at 965 (2d ed. 1988) ("Thus, the Supreme Court has repeatedly ruled that disseminators of confidential information obtained from judicial proceedings are entitled to first amendment protection.").

59. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). See also Steven Helle, *The News-Gathering/Publication Dichotomy and Government Expression* 1982 DUKE LAW J. 1, 44 ("Of course, 'the Press is free to try to uncover, and if it succeeds it is free to publish' the information that the government attempts to conceal."), quoting Louis Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 278 (1971).

obtained through public records, even if the records were released by mistake.⁶⁰ The Court has declared unconstitutional orders attempting to shield from public disclosure the identity of juveniles in court proceedings.⁶¹ The Court has refused to permit penalties against a newspaper for publishing confidential information in the secret proceedings of a state's Judicial Inquiry and Review Commission.⁶² The Court has even extended the principle to revelation of material from grand jury proceedings.⁶³ This now well-entrenched line of precedent was summarized in *Florida*

60. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (holding unconstitutional a civil damages award entered against a television station for broadcasting the name of a rape-murder victim obtained from courthouse records); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (holding unconstitutional the imposition of liability against a newspaper for publishing the name of a rape victim in contravention of a Florida statute prohibiting such publication in circumstances in which a police department inadvertently released the victim's name).

61. *See Oklahoma Publishing Co. v. Oklahoma County District Court*, 430 U.S. 308 (1977) (declaring unconstitutional a state court's pretrial order enjoining the media from publishing the name or photograph of an eleven year-old boy in connection with a juvenile proceeding reporters had attended); *See also Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104 (1979) (finding unconstitutional the indictment of two newspapers for violating a state statute forbidding newspapers to publish, without written approval of the juvenile court, the name of any youth charged as a juvenile offender, where the newspapers obtained the name of the alleged juvenile assailant from witnesses, the police, and a local prosecutor, stating that the "magnitude of the State's interest in this statute is not sufficient to justify application of a criminal penalty").

62. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (overturning criminal sanctions against newspaper for publishing information from confidential judicial disciplinary proceedings leaked to the paper).

63. *See Butterworth v. Smith*, 494 U.S. 624 (1990) (refusing to enforce the traditional veil of secrecy surrounding grand jury proceedings against a reporter who wished to disclose the substance of his own testimony after the grand jury had terminated, holding the restriction inconsistent with the First Amendment principle protecting disclosure of truthful information).

*Star*⁶⁴ with the statement that “if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”⁶⁵

Kirsten Mitchell engaged in the type of newsgathering technique repeated many times a year by reporters covering courts throughout the country. The Supreme Court has expressed solicitude for the First Amendment’s protection of “routine newspaper reporting techniques,”⁶⁶ a solicitude reinforced by numerous lower court decisions.⁶⁷ As the California Court of

64. *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

65. *Id.* at 533, quoting *Smith v. Daily Mail*, 443 U.S. 97, 103 (1979).

66. See *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979). In *In re Charlotte Observer*, 921 F.2d 47 (4th Cir. 1990) (per curiam), the Fourth Circuit struck down an order prohibiting reporters from revealing the fact, disclosed inadvertently in open court when two reporters were present, that an attorney was under grand jury investigation. The Court held:

On the present record, however, “the cat is out of the bag.” The district court did not close the hearing and the disclosure was made in the courtroom, a particularly public forum. Once announced to the world, the information lost its secret characteristic, an aspect that could not be restored by the issuance of an injunction to two reporters. *Id.* at 50.

67. In *Boettger v. Loverro*, 526 Pa. 510 (1991), the appellant was charged with illegal gambling as a result of a police wiretap of phone conversations. A journalist was present in the courtroom during a hearing on a motion to suppress the information obtained in the wiretaps. When the hearing ended, a court clerk gave the reporter a file containing the transcript of the wiretaps. Following publication of the material, the appellant filed a civil action against the newspaper for violating a state wiretap statute proscribing the unlawful disclosure of wire communications. The Supreme Court of Pennsylvania ultimately held that the First Amendment barred the prosecution, stating that “when the assistant district attorney filed a copy of the transcript with the Clerk of Court, the information was in the public domain, irrespective of

Appeals explained:

Consequently, the news gathering component of the freedom of the press -- the right to seek out information -- is privileged at least to the extent it involves "routine . . . reporting techniques." Such techniques, of course, include asking persons questions, including those with confidential or restricted information. While the government may desire to keep some proceedings confidential and may impose the duty upon participants to maintain confidentiality, it may not impose criminal or civil liability upon the press for obtaining and publishing newsworthy information through routine reporting techniques.⁶⁸

whether or not the action of the assistant district attorney was inadvertent." *Id.* at 520-521. In *Florida Publishing Co. v. Brooke*, 576 So.2d 842 (Fla. Dist. Ct. App. 1991), a reporter came into possession of a letter written by a psychologist in a pending child dependency proceeding. The proceeding was closed to the public and the letter was classified by law as not being a public record open to inspection. The trial judge issued an order restraining the reporter from disclosing the contents of the letter. Reversing the order on appeal, the court stated that "[A]lthough a government may deny access to information and punish its theft, government may not prohibit or punish the publication of the information once it falls into the hands of the press unless the need for secrecy is manifestly overwhelming." *Id.* at 846. *See also* *Macon Telegraph Publishing Co. v. Tatum*, 263 Ga. 678 (1993) (adopting the test enunciated in *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) to preclude recovery by rape victim against a newspaper that had published her name after receiving it from police on the condition that it not be published without the victim's permission.)

68. *Nicholson v. McClatchy Newspapers*, 177 Cal. App. 3d 509, 518-20 (1986), *quoting* *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979) *citing* *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837-38 (1978).

Reporters constantly and regularly ask court clerks for information in courthouse files. In the nature of things under our constitutional scheme, it must be the clerk, not the reporter, who is the gatekeeper of confidentiality. This arms-length role of the press in our constitutional system was cogently summarized by Robert Kaiser, Managing Editor of *The Washington Post*, defending the *Post's* recent publication of material taken from a sealed deposition of President Clinton in the Paula Jones sexual harassment litigation:

This means, as some readers have pointed out to us, that we published Baker's story knowing that the information it contained was subject to Judge Wright's order. As a legal matter, such orders do not cover the media, and we and our lawyers believe that judges in America cannot gag the press, whose freedom is protected by the First Amendment to the Constitution. We expend much of our energy on finding information of public interest that others don't want published in a newspaper: that's what the Pentagon Papers case was about. And there are countless, more mundane examples. The District of Columbia's police department chronically withholds information we think belongs in the public domain; we are always battling the department to learn things it wants to hide from us.

When we succeed, we publish it. We believe readers have a right to know.⁶⁹

As the Supreme Court has observed, "without some protection for seeking out the news, freedom of the press could be eviscerated."⁷⁰ And so it is that "a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources and that government cannot restrain the publication of news emanating from such sources."⁷¹

Respect for the structural independence of the media contemplated by the Constitution prohibits courts from conscripting journalists as leak-police. A bright line is required here. The journalist cannot be forced to ask the government source who hands her the document: "Are you sure this is legal? Are you sure this is not under seal?" The bright line is simple and easy to enforce: If the journalist steals information by breaking the law to obtain it, the journalist is subject to whatever generally applicable legal penalties may apply. If the journalist is handed information, the journalist may examine it and publish it. The journalist is protected whether or not the material is labeled "confidential," "classified," or "filed under seal; to be opened only by the court." The journalist is protected whether the information is in a typed document, on a cassette tape, or a computer diskette. The journalist is protected whether the material is or is not in an

69. Robert Kaiser, "More About Our Sources and Methods," *The Washington Post*, March 15, 1998, at C1, C5 col. 2. In the case of President Clinton's deposition, it may well be that the release of sealed material was done deliberately by someone with access to that material, rather than inadvertently, as in the Kirsten Mitchell case. The point, however, is that the First Amendment rights of journalists to publish information given to them by government officials or litigants do not mutate according to the motivation of the person supplying the material.

70. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

71. *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (citations omitted).

envelope, sealed or unsealed. The press and the government are thus locked in contest. The press' "chief responsibility is to play its role in that contest, for it is the contest that serves the public interest, which is not wholly identified either with the interest of the government of the day, or of the press."⁷²

2. Newsgathering Issues

The liability of journalists, in tort or for criminal violations, for surreptitious newsgathering techniques is an evolving branch of mass media law. It has been augmented by the calls, following the death of Princess Diana, for new legislation targeting tabloids or attempting to control or curb paparazzi tactics.⁷³

In 1973 the United States Court of Appeals of the Second Circuit in *Galella v. Onassis*⁷⁴ approved an injunction against the paparazzo Ronald Galella, who had persistently and aggressively pursued photographs of Jacqueline Kennedy Onassis and her children John and Caroline. The trial in the case exposed a textbook of paparazzi practices. There was evidence that Galella had jumped into the path of John Kennedy, Jr. while riding his bicycle in Central Park, causing Secret Service agents concern for the boy's safety, had interrupted Caroline Kennedy while playing tennis, had invaded the children's private schools, and had come uncomfortably close in a power boat to Jacqueline Onassis while she was swimming. He would often jump and posture while taking pictures of Onassis at public events, such as theater openings, and engaged in the practice of bribing apartment house, restaurant, and nightclub doormen to be kept apprised of family movements. He even went so far as to romance a family servant.

72. Alexander Bickel, *The Morality of Consent*, 81 (1975).

73. See Michael Higgins, "Public Relief," ABA BAR J., December, 1997, 69-71. (Observing that "Tabloid stories that pick at celebrities' flaws--real and imagined--have long seemed to be part of the price of fame. Now the stars may get some help from California legislators who are pushing for libel reform," and noting that this has occurred "in a climate of backlash following the death of Princess Diana.").

74. 487 F.2d 986 (2d Cir. 1973).

The trial court found this conduct tortious, and granted injunctive relief, which was sustained, in somewhat modified form, on appeal. Galella was ordered to stay 25 feet away from Jacqueline Onassis and 30 feet from the children, to avoid any touching of them, to avoid any blocking of their movement in public places and thoroughfares, to avoid any act foreseeably or reasonably calculated to place their lives and safety in jeopardy, and to avoid any conduct which would reasonably be seen to harass, alarm, or frighten them. Outside of those restrictions, however, Galella remained free to follow and photograph Onassis and her children, and to sell and publish his photos.⁷⁵

Mainstream media, however, are now being called to task for tactics that appear as aggressive as those of many paparazzi. In *Food Lion, Inc., v. Capital Cities/ABC, Inc.*,⁷⁶ for example, ABC was sued by the grocery store chain Food Lion on various state tort theories such as fraud, trespass, and breach of fiduciary duty for actions by undercover ABC reporters and agents who infiltrated Food Lion operations and used hidden cameras to document alleged safety and sanitary violations by the store. On December 20, 1996, a Greensboro, North Carolina jury found ABC liable for fraud, trespass and breach of loyalty and awarded Food Lion \$1,402 in compensatory damages, which was the approximate cost of hiring and paying the two reporters who obtained jobs in Food Lion stores for the sole purpose of spying on their meat department. One month later, the jury awarded punitive damages of \$5.5 million, later reduced by the trial judge.⁷⁷ The question of the truth or falsity of what ABC broadcast in 1992 was not in issue in the case. Rather, Food Lion limited its attack on ABC's newsgathering techniques, particularly the fraud and deception

75. In 1982 Galella was convicted of 12 violations of the 25-foot restriction, and fined \$120,000. The fine was suspended when Galella agreed to pay Onassis' \$10,000 in legal fees and to promise never again to photograph her.

76. 887 F.Supp. 811 (M.D. N.C. 1995).

77. The trial judge reduced the award to \$315,000.00. See "5.5 Million Food Lion Award Slashed," *Raleigh News & Observer*, August 30, 1997, at A3.

used by ABC in the newsgathering process.⁷⁷ At this writing, the *Food Lion* case is on appeal before the United States Court of Appeals for the Fourth Circuit.

The *Food Lion* litigation is merely the most visible of recent cases challenging aggressive newsgathering practices.⁷⁸ These cases, and the attention the world has paid to the riveting tragedy of Princess Diana's death, raise the question of whether, through either the evolution judicial doctrines or through legislation, laws should be modified to curb such behavior.⁷⁹ As I have previously observed:

One of the most striking things about the coverage of the death of Diana was the ambivalent position of the respectable mainstream media. From the first hours of the breaking story on that faithful Saturday night, there were hints and innuendos in the news coverage that the paparazzi may have

77. See James Boylan, *Punishing the Press: The Public Passes Some Tough Judgements on Libel, Fairness, and Fraud*, COLUM. JOURNALISM REVIEW, 24, March 13, 1997.

78. See also *Desnick v. American Broadcasting Co., Inc.*, 44 F.3d 1345 (7th Cir. 1995); *United States v. Mullins*, 992 F.2d 1472 (9th Cir. 1993); *Wolfson v. Lewis*, 924 F.Supp. 1413 (E.D. Pa. 1996).

79. California Senator Dianne Feinstein and Senate Judiciary Committee Chairman Orin Hatch of Utah recently announced sponsorship of proposed federal legislation, called the Personal Privacy Protection Act, that would make it a crime to persistently follow or chase a person in a manner which causes them to have a reasonable fear of bodily injury in order to film or record them for commercial purposes. The Bill also allows civil actions to be brought against paparazzi who use aggressive techniques for commercial purposes. Information on the proposal is available at <http://www.senate.gov/feinstein/releases/paparssi.html>. See also Rodney A. Smolla, *Report on the Coalition for a New America: Platform Section on Communications Policy*, 1993 U. CHI. LEG. FORUM 149 (1993) (presenting fictional and satirical proposal for "progressive" new legislation designed to legally enforce higher ethical behavior by journalists).

been responsible. The paparazzi were treated by the respectable press as an "other," as some group of evil and officious intermeddlers different in both degree and kind from the very press were watching to bring us the horrible story. But then a strange thing happened. The next morning, as the news hit London and the world that in the middle of the Paris night Diana had died, and as the common folk poured out their grief in a spontaneous show of flowers and photographs tendered at the palace gates, the people turned on the respectable messengers. *"It was you what hounded her to death, you what killed her!"* they said, pointing accusingly at the cameras of CNN and the BBC. The people blamed the death of the Princess of the People not on some small and derelict subset of the media, but on the media writ large, not just on *The Globe* and *The Star*, and *The National Enquirer*, but on *The London Times*, and *The New York Times*, and ABC News.⁸⁰

80. See Rodney Smolla, *From Paparazzi to Hidden Cameras: The Aggressive Side of a Free and Responsible Press*, 3 COMM. L. POL'Y 315 (1998). Even the anger over the brazen willingness of some paparazzi to photograph Diana in a crushed auto as her life slipped away has had some parallels in American litigation. In American mass culture "emergency rescue" television shows, in which medical technicians are accompanied by camera crews in ambulances and helicopters when called to the scene of medical crises, have become increasingly popular. In these programs the television crews attempt to capture on video accident and disaster victims' moments of intense pain, panic and despair as they unfold. The resulting footage is usually taken without the subject's consent, due to the fact that at the time the subject is often incapable of so consenting at the time. In *Shulman v. Group W Productions*, 32

VI. CONCLUSION

The title to this article, **WILL TABLOID JOURNALISM RUIN THE FIRST AMENDMENT FOR THE REST OF US?**, reproduced here in its glaring headline typeface, was itself an exercise in tabloidism, a sensationalized tease calculated to seduce

51 Cal. App. 4th 850, 59 Cal. Rptr. 2d 434, 25 Med. L. Rptr. 1289 (Calif. Ct. App. 1996), the plaintiffs, Ruth and Wayne Shulman, were involved in an auto accident that left them seriously injured and trapped inside an overturned vehicle. A rescue helicopter was dispatched to the scene carrying a nurse miked for sound and a cameraman from the television show "On Scene: Emergency Response." The audio and video equipment captured the plaintiffs' entire ordeal of being cut out of the vehicle and transported via the same helicopter to the hospital, including statements by Ruth that she wanted to die and the nurse's observations about Ruth's condition and vital signs. The nearly nine minutes of rescue footage was subsequently aired on an episode of the show without Ruth's or Wayne's consent, and the Shulmans sued both the company which owned and operated the helicopter and the producers of the show for intrusion upon seclusion, public disclosure of private facts, commercial exploitation of their likenesses, and intentional infliction of emotional distress. The plaintiffs also sought an injunction against further broadcast of the footage of them. The court held that the plaintiffs did not have a reasonable expectation of privacy at the actual scene of the crash, "[g]iven the strong First Amendment policy favoring news coverage of auto accidents and other catastrophes, combined with the public setting of appellant's accident." *Id.* at 1298. (The court also rejected plaintiffs' contention that their conversations with the flight nurse were confidential under the physician-patient privilege, holding that privilege only applies to doctor-patient communications and not to paramedics.) However, the court did find that the plaintiffs had a right of privacy while being transported in the emergency helicopter, which they described as essentially being an "airborne ambulance," *id.* at 1300, and as such "is like a hospital room, a home, or some other private place which gives rise to a patient's reasonable privacy expectations . . . once the ambulance doors swing shut, the unfortunate victim can and should reasonably expect privacy from prying eyes and ears." *Id.* at 1301. Thus, while the plaintiffs' consent to the presence of the paramedics was deemed implied because they were performing essential lifesaving functions, the court held that the media defendants' presence was not privileged absent the express consent of the plaintiffs. Nor would the First Amendment authorize the defendant's presence in the helicopter, once it was determined to be invasive of the plaintiffs' privacy, since the First Amendment does not protect tortious or unlawful news gathering.

the browsing reader into reading. Since I happen to believe that one First Amendment fits all, any suggestion in the title that tabloids will ruin it for the rest of us does not entirely fit the sentiments expressed in the article itself. I believe, as an exercise in legal realism, that the increasing prevalence of practices we associate with tabloids finding their way into the mainstream press will result in diminished First Amendment rights across the board. I suspect this will come less in the alteration of formal doctrines than in the actual outcome of verdicts and damages awards. Whatever happens, I suspect we will learn about it in both *The Wall Street Journal* and the *National Enquirer*, boasting the “largest circulation of any paper in America.”